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No. 06-638

IN THE

Supreme Court of the United States

LINDA HAYNES,

Petitioner,

v.

LEVEL 3 COMMUNICATIONS, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a plaintiff can maintain a discrimination claim based on an adverse employment action for which there is no evidence of discrimination by submitting evidence about untimely acts of discrimination? (This restates Question Nos. 2, 3, and 4 of Haynes' Questions Presented (*see* Pet. at ii).)

2. Whether the discriminatory acts of removing lucrative business accounts from Haynes constituted adverse employment actions that were subject to the time limitations in § 706(e)(1) of Title VII, 42 U.S.C. § 2000e-5(e)(1)? (This restates No. 1 of Haynes' Questions Presented (*see* Pet. at ii).)

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Pursuant to Rule 29.6 of the Supreme Court Rules, Level 3 states the following:

Level 3 Communications, LLC's parent company is Level 3 Communications, Inc. Because Level 3 Communications, LLC is a limited liability company, it does not have any stock. Level 3 Communications, Inc. is the only publicly held company that holds an ownership interest of 10 percent or more in Level 3 Communications, LLC.

In addition, no publicly held company owns 10 percent or more of Level 3 Communications, Inc.'s stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	vi
INTRODUCTION	1
STATEMENT OF THE CASE	4
I. FACTUAL BACKGROUND	4
Haynes' Allegations of Discrimination	5
Haynes' Complaints of Discrimination	7
Haynes' Allegations of Retaliation	8
Haynes' Medical Problems	9
The Reduction in Force	10
Haynes' EEOC Proceedings	10
II. PROCEDURAL HISTORY	11
Proceedings in the District Court	11
Proceedings in the Tenth Circuit	11

Contents

Page

REASONS FOR DENYING THE PETITION 14

I. THE PETITION SHOULD BE DENIED BECAUSE NONE OF THE REASONS SET FORTH IN RULE 10 FOR GRANTING A PETITION APPLIES HERE. 15

A. The Tenth Circuit's Decision Is Not a Departure from the Accepted and Usual Course of Judicial Proceedings That Requires an Exercise of the Court's Supervisory Power. 15

B. The Tenth Circuit's Decision Does Not Conflict With Decisions by Other Courts. 16

II. THE PETITION SHOULD BE DENIED BECAUSE THE TENTH CIRCUIT'S DECISION IS CONSISTENT WITH, AND MANDATED BY, BINDING PRECEDENT FROM THIS COURT. 18

III. HAYNES' HYPOTHESIS THAT THE TENTH CIRCUIT'S RULING WILL CREATE A PARADE OF REPETITIOUS EEOC FILINGS IS UNREALISTIC. 20

IV. THIS CASE DOES NOT IMPLICATE AN UNRESOLVED ISSUE IN *MORGAN*. 22

Contents

Page

V. THE ISSUES RAISED BY THE PETITION ARE DIFFERENT FROM THOSE PRESENTED BY *LEDBETTER*. 23

CONCLUSION 25

TABLE OF CITED AUTHORITIES

Page

SUPREME COURT CASES

Del. State Coll. v. Ricks, 449 U.S. 250 (1980) . . 3, 13, 19

Lorance v. AT&T Techs., Inc., 490 U.S. 900 (1989) 3, 20

Machinists v. NLRB, 362 U.S. 411 (1960) 20

Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002) . . . . . *passim*

Pa. State Police v. Suders, 542 U.S. 129 (2004) . . . 4

United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977) 3, 13, 20

OTHER CASES

Belton v. City of Charlotte, 175 Fed. Appx. 641 (2006) 16

Carpinteria Valley Farms Ltd. v. County of Santa Barbara, 334 F.3d 796 (9th Cir. 2003) 17, 18

Law v. Continental Airlines Corp., 399 F.3d 330 (D.C. Cir. 2005) 18

Cited Authorities

Page

Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169 (11th Cir. 2005), *cert. granted*, ___ U.S. ___, 126 S. Ct. 2965 (June 26, 2006) ..... *passim*

Stinnett v. Safeway, Inc., 337 F.3d 1213 (10th Cir. 2003) 22

STATUTES AND RULES

42 U.S.C. § 1983 17

42 U.S.C. § 2000e-5(e)(1) ..... i, 2, 3, 19

Sup. Ct. R. 10 ..... 1, 2, 15

Sup. Ct. R. 10(a) 1, 15

Sup. Ct. R. 10(b) 16

Sup. Ct. R. 10(c) 16

Sup. Ct. R. 29.6 ii

Page

OTHER AUTHORITIES

Pet. for Writ of Cert., *Ledbetter v. Goodyear Tire & Rubber Co.*, No. 05-1074, 2006 WL 448515 (Feb. 17, 2006) 23, 24

Tr. of Oral Argument, *Ledbetter v. Goodyear Tire & Rubber Co.*, No. 05-1074, 2006 WL 3422212 (Nov. 27, 2006) 24

INTRODUCTION

"A petition for a writ of certiorari," Supreme Court Rule 10 provides, "will be granted only for compelling reasons." Sup. Ct. R. 10. Rule 10 then gives three examples of the "character of the reasons the Court considers" in deciding whether to review a decision by a United States court of appeals: When the decision (a) conflicts with a decision by another United States court of appeals on an important matter; (b) decides an important federal question in a way that conflicts with a decision by a state court of last resort; or (c) has so far departed, or sanctions a lower court's departure, from the "accepted and usual course of judicial proceedings" as to "call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

Petitioner, Linda Haynes ("Haynes") does not contend that any of the reasons given in Rule 10(a) for granting review apply to her Petition for a Writ of Certiorari ("Petition"). She does not argue that the decision by the United States Court of Appeals for the Tenth Circuit conflicts either with a decision "of another United States court of appeals on the same important matter," or with a decision on an important federal question "by a state court of last resort. . . ." Sup. Ct. R. 10(a). To the contrary, Haynes repeatedly argues that the Tenth Circuit's decision "follow[s] a line of cases from the First Circuit and the D.C. Circuit. . . ." (Pet. at 20.) Similarly, Haynes does not assert that the Tenth Circuit's decision "so far departed from the accepted and usual course of judicial proceedings" as to require "an exercise of this Court's supervisory power. . . ." Sup. Ct. R. 10. Rather, Haynes acknowledges that the decision "is the natural consequence of this Court's abolition of the continuing violation theory" in *National Railroad Passenger Corp. v. Morgan*, 536 U.S.

101 (2002). (Pet. at 13.) Thus, Haynes fails to advance any reason why, under the reasons delineated in Supreme Court Rule 10, the Petition should be granted.

In fact, Haynes does not appear to argue that the court of appeals' decision was erroneous under the principles delineated in *Morgan*: that (a) "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges;" (b) "[e]ach discriminatory act starts a new clock for filing charges alleging that act;" (c) "[t]he existence of past acts and the employee's prior knowledge of their occurrence . . . does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed;" and (d) 42 U.S.C. § 2000e-5(e)(1) does not "bar an employee from using the prior acts as background evidence in support of a timely claim." *Id.* at 113. Instead, Haynes argues that application of these rules (particularly the rule that each discriminatory act starts a new clock for filing charges) may create a cumbersome procedure for filing charges before the Equal Employment Opportunity Commission ("EEOC"). Haynes' argument, however, does not identify a realistic concern, and thus provides no reason for granting the Petition.

Moreover, to the extent Haynes' Petition can be read to allege error in the Tenth Circuit's decision, the Petition is mistaken. The decision merely stands for three unremarkable, and undeniably correct, propositions. First, a claim of discrimination under Title VII and the ADEA is time barred if all of the allegedly discriminatory acts on which they are based occurred more than 300 days before the plaintiff filed an EEOC charge. Second, an adverse employment action that is not based on discrimination, but is predicated on neutral

factors, cannot provide the basis for a claim of discrimination even if a plaintiff argues that it is related to earlier, untimely acts of alleged discrimination. Third, untimely acts of discrimination cannot, by themselves, provide a basis for determining that a timely, neutral action is based on discrimination.

These holdings are mandated by the plain language of the limitations period set forth in § 706(e)(1) of Title VII, 42 U.S.C. § 2000e-5(e)(1), and this Court's holdings in *Morgan*, 536 U.S. 101; *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); and *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). Accordingly, because the Tenth Circuit's decision is in accord with decisions by this Court over the past 30 years, and because Haynes has not identified any conflicting state or federal decisions, the Petition presents no reason – let alone a compelling reason – for certiorari review.

Despite the fact her Petition does not implicate any of the "compelling reasons" for review identified in Rule 10(a), Haynes advances two reasons why, she believes, the Court should grant the Petition. First, Haynes notes that in *Morgan*, the Court left open the question of whether the time for filing an EEOC charge ran from the date of injury or the date of discovery. (Pet. at 27 (quoting *Morgan*, 536 U.S. at 115 n.7).) Haynes suggests that this case might present an opportunity for deciding that open question. (Pet. at 27.) Second, Haynes asserts that the issue currently pending before this Court in *Ledbetter v. Goodyear Tire and Rubber Co.*, 421 F.3d 1169 (11th Cir. 2005), *cert. granted*, __ U.S. __, 126 S.Ct. 2965 (June 26, 2006), "is identical to the evidentiary issue in the instant case," and thus the "reasons for granting the instant Petition" are as "compelling" as they were in *Ledbetter*. (Pet. at 27 (emphasis omitted).)

These reasons likewise do not provide a basis for granting the Petition. First, her suggestion that this case presents an opportunity for the Court to decide whether the deadline for filing an EEOC charge runs from the date of injury or the date of discovery ignores the fact that the unlawful employment practices at issue in this appeal occurred, and were discovered, more than 300 days before she filed a complaint with the EEOC. Thus, even if the Court were inclined to decide the issue unresolved by *Morgan*, the Petition would not be an appropriate vehicle for doing so. Second, Haynes is mistaken about the similarity between this case and *Ledbetter*. Unlike the case in *Ledbetter*, the issues raised in the Petition are not new ones. They have already been decided by this Court. Accordingly, there is no dispute, among the United States courts of appeals or elsewhere, about their proper resolution.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND[1]

In March 1999, Haynes began working for Level 3 as a "carrier sales manager." (Pet. App. 4a.)[2] Haynes, who had been a top sales person for eight and a half years at a company named IXE before coming to Level 3, was 44 years old at the time. (Tenth App. 68, 2.)

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1. As the Tenth Circuit noted, "Level 3 vehemently disputes many of the facts alleged by Haynes." (Pet. App. 7a n.6.) Because Haynes' claims were dismissed in response to a summary judgment motion, however, this Statement of Facts recites the evidence "in the light most favorable to" Haynes. *See Pa. State Police v. Suders*, 542 U.S. 129, 134 (2004).

2. Facts set forth in the Appendix to the Petition are cited to as "Pet. App." Facts contained in the Appendix and Supplemental Appendix filed with the court of appeals are cited to as "Tenth App." or "Tenth Supp. App."

A few months after she started at Level 3, Haynes began working for a manager named Paul Larson ("Larson"). (Pet. App. 4a.) Initially, there were no problems with Haynes' job performance, and her relationship with Larson, with whom she had been friends prior to her employment at Level 3, was harmonious. (Tenth App. 190, 51-54.) During 1999, and the first few months of 2000, Haynes received positive job performance evaluations, and at least one raise. (Tenth App. 445:3-25; *id.* 447:6-16.)

Haynes' Allegations of Discrimination

In approximately August 1999, Larson hired a 31 year old male employee named Shane Quivey ("Quivey"). (Pet. App. 4a.) Haynes alleged that after Quivey was hired, Larson began to discriminate against her based on her age, her sex, and her disability. Among other things, (a) Haynes' most lucrative accounts were taken away from her and given to Quivey, who engaged in improper workplace behavior (Pet. App. 5a; Tenth App. 213:18-23; *id.* 218:4-22; *id.* 453:1-23; *id.* 241:25-242:12); (b) Larson cancelled orders written by Haynes and directed Level 3's accounting department to rewrite the orders under Quivey's name (Tenth App. 227:17-24); (c) Quivey was given favored treatment in the form of assignments to the best leads and better pricing for his clients (Pet. App. 5a); and (d) Larson bad mouthed Haynes to her customers (Tenth App. 240:1-18). In May 2000, Larson demanded that Haynes come to work against her doctor's advice, "only to have her attend a meeting at which she was directed to give Quivey one of her most lucrative accounts." (Pet. App. 5a; Tenth App. 231:6-235:2.)

Haynes described this meeting as a "watershed moment," in which she came to the realization that Larson's actions

against her were based on discrimination. (Pet. App. 5a.) In Haynes' words:

> It was another watershed moment or a turning point where I realized that it was going to be a turning point, that Paul [Larson] knew that I knew what he was doing.. . . And I rea zed at that moment that possibly it could be like you could be – he could set up an enemy camp separate from mine because he wanted me just to go along with "this is how I treat women; this is how I treat men; I'm your boss; I can do whatever I want and cover it up with top people, and you're challenging me; and now I know you know what the truth is, and I'm going to continue to do this." There was that understanding after that meeting.

(Tenth App. 239:12-24; *see also* Pet. App. 5a.) Haynes "confronted Larson and accused him of discriminating against her on the basis of her age and sex." (Pet. App. 5a.)

Allegedly because of Larson's discrimination, Haynes' job performance suffered. According to Haynes, her accounts dwindled, while Quivey's increased so that "[s]oon Quivey had 90 accounts to plaintiff's 20 or 25. Plaintiff's accounts were soon whittled down to three *viable* accounts (Pac Bell, Mobile and SBC)."[3] (Tenth App. 185 ¶21 (citations omitted).)

3. In her Factual Background, Haynes states that because of Larson's removal of accounts, "[s]oon the younger male newcomer had ninety accounts to Haynes' twenty or so." (Pet. at 2, citing Pet. App. 31a.) In her summary judgment papers in the district court, Haynes averred: "Soon Quivey had 90 accounts to plaintiff's 20 or 25. *See*, Exhibit 1, p.42, ll.5-3. Plaintiff's accounts were soon whittled down to three *viable* accounts (Pac Bell, Mobile and SBC). *Id.*, at p.96, ll.10-24." (Tenth App. 185 ¶21.)

In addition, Haynes' work "shifted more and more toward the clerical, and she complained about it." (Tenth App. 185 ¶18 (underlining omitted); *see* Pet. at 2.) By August 2000, Haynes was only meeting somewhere between seven and 13 percent of her monthly sales quota. (Tenth App. 153; Pet. App. 6a & n.4.)

Haynes' Complaints of Discrimination

After Haynes realized she was being subjected to discrimination by Larson, she brought several complaints to Level 3. On May 18 or 19, 2000, Haynes complained to Larson's supervisor, Mike Lanza ("Lanza"), that Larson was discriminating against her by giving the benefits of her work to somebody else. (Pet. App. 6a.) In July and August, 2000, Haynes confronted Larson about his management style. (Tenth App. 451:18-25.) On September 18, 2000, Haynes sent an e-mail to Scott Roberts ("Roberts"), the Senior Vice President of Sales and Marketing (and Lanza's supervisor), complaining of Larson's management style and his failure to support her. (Pet. App. 6a.) The following day, on September 19, 2000, Haynes sent a second e-mail to Roberts

> regarding Larson's lack of management skills in more detail and requesting help in resolving the problem. She complained Larson's lack of support caused customers to get angry with her and, in turn, caused Larson to reassign her accounts to Quivey. She also alleged Larson had been unavailable to help close deals, fell asleep during customer calls and had told her not to discuss her problems with upper management.

(Pet. App. 7a.)

On October 24, 2000, Roberts notified Haynes that he had asked Randall Hester ("Hester"), a Director of Human Resources, to meet with Haynes about her complaints. On November 1, 2000, Haynes spoke with Hester and, according to her, told Hester both that she was being discriminated against on the basis of sex and that two other women had been victims of discrimination. (Pet. App. 7a-8a n.6.)

Haynes' Allegations of Retaliation

Haynes contends that her complaints of discrimination resulted in retaliation against her. The day after her second e-mail to Roberts, for example, Larson and Lanza both issued e-mails prohibiting employees from going over the heads of supervisors. (Pet. App. 8a; Tenth App. 361.) On October 3, 2000, Larson issued Haynes a formal, written warning. (Pet. App. 7a.) And on November 13, 2000, Larson placed Haynes on a performance improvement plan ("PIP"). (Pet. App. 8a.) The PIP identified five areas of improvement, including that Haynes "[m]eet or exceed 100% of [her] monthly sales quota of $50,000 for December '00 and January '01." (Pet. App. 8a.) The PIP also stated:

> I am looking for an immediate, dramatic and sustained improvement in your sales performance. Your objectives during your written warning period must be met and a satisfactory level of sales performance must be maintained in the future. It is crucial you understand how important your required improvement is, since continued unsatisfactory sales performance will result in further disciplinary action.

(Pet. App. 8a-9a; Tenth App. 153.)

Haynes' Medical Problems

Nine days after Haynes was placed on a PIP, her physician notified Level 3 that she was "placing [Haynes] on a 2 week medical disability while she consults with specialists who will determine the full time required for recovery." (Pet. App. 9a; Tenth App. 158.) Five days later, Haynes took a medical leave of absence. The first twelve weeks of the leave were taken pursuant to the Family Medical Leave Act ("FMLA Leave"). (Pet. App. 9a.) After that time, Haynes took indefinite leave under Level 3's medical leave policy. (*Id.*) For the first portion of her FMLA Leave – through February 26, 2001 – Haynes received short-term disability ("STD") payments from Level 3's third party insurance carrier. (*Id.*) After the STD payments expired in February, 2001, Haynes applied to the carrier for long-term disability benefits. (*Id.*) Haynes' application was denied by the carrier, and it was undisputed that "Level 3 had no control or influence over this decision." (*Id.*)

Haynes' medical problems included ulcerative colitis, depression, and (according to Haynes) traumatic stress syndrome. These conditions incapacitated Haynes completely for at least nine months, and prevented her from performing any job for at least a year. (Tenth App. 120, ll.1-7). Haynes described her mental and physical state during and after the time she was on medical leave as follows:

> I was in a state, I could not work for nine months. For the first time – I did have colitis before, but I had incontinence, and I was having irritable bowel. I was having colitis, bladder problems. I was having panic attacks. I was having vertigo. And I couldn't eat anything without just laying

> on the floor in pain. I was absolutely not in the condition to work.
>
> * * * *
>
> I could not leave the house. I could not do anything. My mom was feeding me with a straw. I couldn't even fax something with the initial attorney I had. I stayed under the covers up to my neck.

(Tenth App. 250:4-11; *id.* 113:18-22.)

The Reduction in Force

Haynes remained on medical leave until June 2001, when Level 3 underwent one of several reductions in force ("RIF"). (Tenth App. 71, 24.) One of the criteria that triggered an employee's selection for the RIF was the employee's placement on a PIP. (Pet. App. 9a; Tenth App. 26, 192-93, 65-68.) Plaintiff was selected for the June 2001 RIF, as were her supervisor, Larson, and his supervisor, Lanza. (Pet. App. 9a.) Roberts made the decision to discharge Haynes, Larson and Lanza as part of the RIF. (Pet. App. 9a.)

Haynes' EEOC Proceedings

On October 11, 2001, Haynes filed a charge of discrimination with the EEOC. (Pet. App. 9a.) On June 27, 2002, at the request of Haynes, the EEOC issued a Notice of Right to Sue letter. (Pet. App. 9a.)

II. PROCEDURAL HISTORY

Proceedings in the District Court

On September 4, 2002, Haynes filed this action against Level 3. (Pet. App. 9a; Tenth App. 8-14.) In her First Amended Complaint, filed on January 24, 2003, Haynes alleged four claims: for violations of the ADA, the ADEA, and Title VII, and for breach of contract. (Pet. App. 9a-10a.)

On May 5, 2003, Level 3 moved for summary judgment. (Tenth Suppl. App. 1-2.) In its supporting papers, Level 3 argued, among other things, that Haynes' EEOC charge was untimely. (Tenth App. 75 n.1.) On July 16, 2004, the district court held a hearing on the timeliness of Haynes' EEOC charge. (Tenth Suppl. App. 3.) After the hearing, Haynes filed a motion, which the court granted, to submit supplemental authority on the issue of timeliness. (Tenth App. 536-99.) On July 27, 2004, the district court granted summary judgment on Haynes' claims under the ADA, the ADEA, and Title VII. (Tenth App. 600-19.) The court held that Haynes' ADA, ADEA, and Title VII claims were barred because Haynes had not filed a timely EEOC charge. (Tenth App. 613-17.) The court also declined to exercise supplemental jurisdiction over Haynes' breach of contract claim, dismissing it without prejudice. (Tenth App. 617.)

Proceedings in the Tenth Circuit

Thereafter, Haynes filed an appeal to the Tenth Circuit, which was submitted to the court on the briefs. On August 8, 2006, the Tenth Circuit issued an opinion affirming the district court's dismissal of Haynes' federal-law claims, finding that none of them was timely.

The court of appeals began by determining the threshold question of what allegations "constituted an adverse employment action because such 'discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges.'" (Pet. App. 11a.) The court concluded that Haynes' discharge was unquestionably "an adverse employment action that occurred within the 300-day statutory time period." (Pet. App. 18a.) The Tenth Circuit ruled that the discharge was not an unlawful employment action, however, because "Haynes failed to present evidence of a discriminatory intent, *i.e.*, that her inclusion in the RIF was based on her age, disability or sex, respectively, because her termination was pursuant to a neutral policy." (Pet. App. 18a-19a.) The court of appeals also concluded (in dicta)[4] that under the circumstances of the case, the decision to place Haynes on a PIP was not an adverse employment action. (Pet. App. 15a-17a.) Finally, the court found that the removal of Haynes' accounts from her were adverse employment actions. The Court stated:

> Haynes clearly knew the discriminatory nature of Larson's actions and the resulting detrimental effect to her income. Indeed, in a November 7, 2000 e-mail to Larson, Haynes stated, "this has impacted my sales output tremendously, as the work I've done is not reflected in my base and someone else is now getting paid on much of my work." (R.VIII at 333.) Because each removal of

4. To be timely, the "discriminatory actions on which [Haynes] base[d] her claims must have occurred on or after December 15, 2000." (Pet. App. 10a.) Haynes was placed on the PIP on November 13, 2000. (Pet. App. 8a.) Therefore, Haynes' placement on the PIP was untimely, and the issue of whether it was an adverse employment action was unnecessary to resolution of the case.

> an account constituted an actionable adverse employment action, Haynes was required to file an administrative charge within 300 days of each removal. She did not do so. Thus, any claim based on the removal of her accounts is time-barred.

(Pet. App. 15a.)

The Tenth Circuit then considered whether Haynes had filed a timely claim to the EEOC. The court ruled that Haynes had not. Her allegations concerning removal of her accounts alleged adverse employment actions based on discrimination, but the actions were not timely. (Pet. App. 14a-15.) Her allegation concerning her placement on the PIP neither alleged an adverse employment action, nor was timely. (Pet. App. 15a-17a.) And her allegation that she was unlawfully terminated as part of a RIF alleged an adverse employment action that was timely, but there was no evidence that it was based on discrimination. (Pet. App. 23a.) Thus, none of the actions were sufficient to sustain Haynes' claims.

The court of appeals also rejected Haynes' argument that she could use the untimely discriminatory adverse employment actions to establish that the timely adverse employment action of termination was also discriminatory. Based on its review of relevant case law, including this Court's decisions in *Evans* and *Ricks*, the Tenth Circuit held:

> Haynes cannot use Larson's alleged intent in performing time-barred discrete actions resulting in the PIP to attach discriminatory intent or pretext to the termination decision based on a neutral policy. Haynes has failed to allege any discriminatory act on or after December 15, 2000.

> She does not claim that a PIP was outside standard operating procedure to address a failure to meet her sales quota. Neither has she alleged that Level 3 did not even-handedly include all employees currently on a PIP in the RIF. Finally, Haynes presented no evidence that any other employees on a PIP were spared in the RIF. As a result, she fails to demonstrate any timely inference of discrimination in her inclusion in the RIF.

(Pet. App. 23a-24a.)

REASONS FOR DENYING THE PETITION

Haynes' Petition should be denied because she has not presented any "compelling reasons" for review by this Court. First, Haynes does not assert that any of the reasons set out in Rule 10 for granting a petition apply here. Second, the Tenth Circuit's decision is not erroneous; to the contrary, it is consistent with, based on, and mandated by, binding decisions by this Court. Third, the parade of horribles advanced by Haynes is merely the hypothetic construct of a fertile imagination that does not identify any legitimate concerns. And fourth, despite Haynes' attempt to recast this case, the Petition presents neither (a) an opportunity to address unresolved issues in *Morgan*, nor (b) the same issues that are before the Court in *Ledbetter*. Accordingly, Level 3 requests that the Court deny the Petition.

I. THE PETITION SHOULD BE DENIED BECAUSE NONE OF THE REASONS SET FORTH IN RULE 10 FOR GRANTING A PETITION APPLIES HERE.

Rule 10(a) recognizes that certiorari review may be appropriate when a court of appeals (a) issues a decision that conflicts "with the decision of another United States court of appeals on the same important matter," (b) decides "an important federal question in a way that conflicts with a decision by a state court of last resort," or (c) "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power. . . ." Sup. Ct. R. 10(a). . . ." None of these situations exists here.

A. The Tenth Circuit's Decision Is Not a Departure from the Accepted and Usual Course of Judicial Proceedings That Requires an Exercise of the Court's Supervisory Power.

In the Petition, Haynes does not contend that in deciding this case the Tenth Circuit "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power. . . ." Sup. Ct. R. 10. Although Haynes asserts that this Court's abolition of the continuing violation theory in *Morgan* is "now being honed to razor sharpness in the circuit courts" (whatever that means) (*see* Pet. at 13), she does not suggest in any way that this "honing" is jurisprudentially improper. Rather, she acknowledges that the circuit court decisions are a "natural consequence" of *Morgan*. (Pet. at 13.) Moreover, Haynes does not suggest that the Tenth Circuit's decision is an outlier by rogue judges or a rogue court. Instead, she concedes that the Tenth Circuit is following decisions by the First Circuit and the D.C. Circuit "spawned by *Morgan* . . . ." (Pet. at 20; 21-23.)

Haynes' admissions that the Tenth Circuit's decision in this case was "spawned by," and is a "natural consequence of" *Morgan*, disclose what appears to be Haynes' true objective in petitioning for certiorari review: she is unhappy with this Court's rejection in *Morgan* of the continuing violation doctrine. But because Haynes has not petitioned this Court to review and reverse *Morgan*, and because she has advanced no explanation why *Morgan* was wrongly decided, her unhappiness cannot be ameliorated here.

B. The Tenth Circuit's Decision Does Not Conflict With Decisions by Other Courts.

Haynes also does not contend that the Tenth Circuit's decision conflicts on an important matter with another federal court or a state court of last resort. To begin with, Haynes indisputably does not assert a conflict with a decision by a state court in another case because in the Petition she does not cite to a single state court decision, conflicting or otherwise.[5] Further, with one exception, Haynes' Petition does not assert a conflict between the decision here and any decision by another court of appeals. Indeed, the opposite is true. Haynes argues in the Petition that the Tenth Circuit "is **following** a line of cases from the First Circuit and the D.C. Circuit spawned by *Morgan*, *supra*." (Pet. at 20 (emphasis added).) Moreover, as shown below (*see infra* § II), this "line of cases" – which also includes decisions by the Fourth Circuit Court of Appeals, *see, e.g.*, *Belton v. City of Charlotte*, 175 Fed. Appx. 641, 653 (2006) (unpublished) – is entirely consistent with prior decisions by this Court.

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5. Because no state court decision is at issue, the guidelines for certiorari review in Rule 10(b) and (c) are irrelevant. *See* Sup. Ct. R. 10(b), (c).

Haynes points to a single case – *Carpinteria Valley Farms Ltd. v. County of Santa Barbara*, 334 F.3d 796 (9th Cir. 2003) – that she claims "differ[s] from the First, Tenth and D.C. Circuits. . . ." (Pet. at 23.) Haynes' attempt to manufacture a conflict with *Carpinteria* fails. In *Carpinteria*, which applied *Morgan* to claims brought under 42 U.S.C. § 1983, the plaintiff brought an action against Santa Barbara County based on the County's imposition of conditions for issuance of a building permit. The court of appeals found that all of the discrete acts alleged by the plaintiff to be unconstitutional were time barred "except for those pertaining to the polo field application and the residential building permit. . . ." *Id.* at 800. Thus, the court held, the "time barred acts could not be used to support [the plaintiff's] claims of constitutional violations," although they could be used "as evidence to establish motive and to put his timely filed claims in context." *Id.* at 800-01.

The Ninth Circuit's statement in *Carpinteria* – that although evidence of untimely acts are not admissible to support a plaintiff's claim that timely acts were unconstitutional (or discriminatory), such evidence may be admissible for other evidentiary purposes, such as showing motive and context (in *Morgan*'s words, "as background evidence") – is entirely consistent with the Tenth Circuit's decision here. In fact, the Tenth Circuit's decision echoes the Ninth Circuit's statement; the Tenth Circuit expressly declares that "Haynes is correct that the statute [§ 706(e)(1) of Title VII] does not 'bar an employee from using prior acts as background evidence in support of a *timely* claim.'" (Pet. App. 13a (emphasis added) (quoting *Morgan*, 536 U.S. at 113).) Thus, there is no conflict or inconsistency with, or difference between, the Ninth Circuit's analysis in *Carpinteria* and the Tenth Circuit's decision in this case.

II. THE PETITION SHOULD BE DENIED BECAUSE THE TENTH CIRCUIT'S DECISION IS CONSISTENT WITH, AND MANDATED BY, BINDING PRECEDENT FROM THIS COURT.

Although Haynes' assertion of a conflict between this case and *Carpinteria* is incorrect, it illuminates Haynes' failure to grasp the key fact on which the Tenth Circuit's decision turned. In this case, **all** of the acts for which there was evidence of discrimination, or from which discrimination could be inferred, occurred more than 300 days before Haynes filed her EEOC charge. Accordingly, unlike the case in *Carpinteria* – where untimely acts were relevant (as background evidence and to show motive) to the plaintiff's **timely** claims – here there were no timely claims. And, as the Tenth Circuit ruled, untimely discrimination "cannot suffice [to establish a timely claim] where [there is] no evidence of discriminatory purpose other than (at most) [a] discrete time-barred decision. . . ." (Pet. App. 13a-14a (quoting *Law v. Continental Airlines, Corp.*, 399 F.3d 330, 334 (D.C. Cir. 2005).

The Tenth Circuit's holding in this regard is not novel. In *Morgan*, this Court stated that "[t]he existence of past acts . . . does not bar employees from filing charges about related discrete acts so long as the acts are **independently discriminatory** and charges addressing those acts are themselves timely filed." *Morgan*, 536 U.S. at 113 (emphasis added). Thus, under *Morgan*, evidence of untimely discriminatory acts is admissible only to support timely claims that are **independently discriminatory**. Such evidence cannot, through some prejudicial form of alchemy, transform a timely neutral act for which there is no evidence of discrimination into a timely discriminatory act.

Further, this Court's recognition that untimely acts of discrimination are not admissible absent a timely, and independently discriminatory, claim did not originate with *Morgan*. In its discussion, the *Morgan* Court described *Ricks*, 449 U.S. 250, as standing for the following propositions:

> [A plaintiff] could not use a termination that fell within the limitations period to pull in the time-barred discriminatory act. **Nor could a time-barred act justify filing a charge concerning a termination that was not independently discriminatory.**

Morgan, 536 U.S. at 113 (emphasis added). Yet that is precisely what Haynes attempted to do in this case. Level 3 engaged in multiple acts, all of which were untimely when Haynes filed her EEOC charge, that were allegedly based on discrimination. Level 3 also engaged in a single act – terminating Haynes' employment as part of a RIF – that was timely but which, according to the undisputed evidence, was not based on discrimination. Because the termination alone could not sustain Haynes' claims (as it was not unlawful, *see* 42 U.S.C. § 2000e-5(1)), Haynes sought to use the time barred acts of discrimination to "justify filing a charge concerning [her] termination" even though it was not "independently discriminatory." Accordingly, the Tenth Circuit did not err in rejecting Haynes' attempted misuse of the untimely acts of discrimination. In fact, *Morgan* and *Ricks* mandated that result.

Moreover, *Morgan* and *Ricks* are not the only cases in which this Court has addressed the issue raised in the Petition. Over the past 30 years, this Court has consistently rejected efforts to infer discrimination based on timely neutral acts

solely because of the existence of time-barred, discriminatory acts. In *Evans*, for example, this Court held that "a challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected [the current employment status] even if the past event might at one time have justified a valid claim against the employer." *Evans*, 431 U.S. at 560. And in *Lorance*, the Court emphasized, in a statement that is directly applicable here, "'[W]here a complaint based upon that earlier event is time-barred, . . . to permit the event itself' 'to cloak with illegality that which was otherwise lawful' 'in effect results in reviving a legally defunct unfair labor practice.'" *Lorance*, 490 U.S. at 911 (quoting *Machinists v. NLRB*, 362 U.S. 411 (1960)).

III. HAYNES' HYPOTHESIS THAT THE TENTH CIRCUIT'S RULING WILL CREATE A PARADE OF REPETITIOUS EEOC FILINGS IS UNREALISTIC.

As shown previously, Haynes does not argue that the Tenth Circuit's decision is contrary to other federal court decisions. Instead, she attacks the decision indirectly by asserting that it will create havoc in the EEOC. According to Haynes, the adverse employment actions that she suffered before her discharge – the removal of individual sales accounts and similar incidents – were "petty actions" (Pet. at ii), that did not "significantly affect[]" her compensation. (Pet. at 3.) But because the Tenth Circuit in the decision created a "portentous" rule that an employee has to file a formal charge with the EEOC in response to each petty action, "[a]ll manner of work charges" will have to be "complained about immediately, or the victim [will] be forever time-barred from doing so." (Pet. at 12.) For example, Haynes contends, under the Tenth Circuit's decision, she would have to file a series of 70 lawsuits, one for each time an account was removed. (*Id.*)

Haynes' argument completely misses the mark. The Tenth Circuit's ruling does not require Haynes to file 70 lawsuits. What it does require is for Haynes to file at least one claim with the EEOC no more than 300 days after a discriminatory adverse employment action occurs. And it is undisputed that Haynes never did that.

Nor does Haynes provide any legitimate reason for her failure. Although Haynes attacks the Tenth Circuit's conclusion that the loss of accounts by her was an adverse employment action – as mentioned, in the Petition Haynes characterizes the loss of accounts as "petty" – her position has changed dramatically. In the trial court, Haynes testified under oath in her deposition that the discrimination she suffered – all of which occurred more than 300 days before she filed an EEOC charge – caused such severe emotional and physical injuries that she was completely incapacitated for at least nine months. According to Haynes' sworn deposition testimony, because of the discrimination against her, she suffered traumatic stress syndrome, ulcerative colitis, irritable bowel syndrome, depression, and incontinence. Haynes also testified that she suffered panic attacks, and vertigo. And, in Haynes' own words, "I could not leave the house. I could not do anything. My mom was feeding me with a straw. I couldn't even fax something with the initial attorney I had. I stayed under the covers up to my neck." (Tenth App. 250:4-11; *id.* 113:18-22.)

Further, although Haynes now contends that she did not suffer any real economic loss from the discrimination she suffered (in Level 3's view, a highly ironic admission), the evidence she presented in the trial court suggests otherwise. (*See* Pet. App. 14a-15a.) But even if that were not the case, adverse employment actions "'are not simply limited to

monetary losses in the form of wages or benefits.'" *Stinnett v. Safeway, Inc.*, 337 F.3d 1213, 1217 (10th Cir. 2003) (citation omitted). An action that results in "significantly different responsibilities" – such as Haynes' allegation that as her accounts were withdrawn and her responsibilities were "shifted more and more toward the clerical," (Tenth App. 185 ¶18) – can constitute an adverse employment action. *Id.* Accordingly, it cannot seriously be disputed that Haynes' allegations and testimony demonstrate that the court of appeals correctly concluded that the discriminatory acts by her supervisor against her constituted "adverse employment actions."[6] Under these circumstances, the law requires that she file a charge with the EEOC within 300 days after the discrimination occurred. Because she did not, her claim was barred.

IV. THIS CASE DOES NOT IMPLICATE AN UNRESOLVED ISSUE IN *MORGAN*.

Haynes next contends that the Court should grant the Petition to address an issue that was left open in *Morgan*: Whether the time for filing an EEOC charge begins to run "'when the injury occurs as opposed to when the injury reasonably should have been discovered.'" (Pet. at 27 (quoting *Morgan*, 536 U.S. at 115 n.7).) But this case does not present that issue. It is undisputed that Haynes had discovered that she was being subjected to discrimination

6. Further, Haynes appears confused about the significance of the court of appeals' ruling. If the court had found, as Haynes appears to suggest it should have, that the loss of accounts did not constitute an adverse employment action based on discrimination, that finding would not have altered the court's determination that the termination of her employment was not based on discrimination. It would only mean that Haynes had not suffered an adverse employment action based on discrimination, and thus she had no claim to bring.

more than a year before she filed her EEOC charge. (Pet. App. 22a n.13.) Indeed, Haynes described in detail the "watershed moment," when she realized that Larson was discriminating against her. (Tenth App. 239:12-24; *see also* Pet. App. 5a.) Moreover, Haynes complained of discrimination on numerous occasions outside the limitations period to the Human Resources Department, to her supervisor (Larson), to her supervisor's supervisor (Lanza), and even to the supervisor of her supervisor's supervisor (Roberts). (*See supra* pp. 7-8.) Thus, regardless whether an occurrence or discovery test is applied, Haynes' own testimony demonstrates that her claims were untimely.

V. THE ISSUES RAISED BY THE PETITION ARE DIFFERENT FROM THOSE PRESENTED BY *LEDBETTER*.

Finally, Haynes argues that the Court should grant the Petition because a case that presents the identical issues as the Petition – *Ledbetter* – is currently pending before the Court.[7] In truth, however, *Ledbetter* is inapposite to the issues raised in the Petition. The issue in *Ledbetter* concerns the applicability of the continuing violation doctrine to a pay disparity case.[8]

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7. Haynes' argument that the supposed similarity between the issues raised in the Petition and the pending issues presented by *Ledbetter* creates a compelling reason for granting the Petition is counterintuitive. If the identical issues are pending before this Court, there would appear to be no "compelling reasons" for granting certiorari in this case. Nonetheless, the issues in the Petition are not "identical" to the issues in *Ledbetter*.

8. The Petition for Writ of Certiorari in *Ledbetter* set forth the following Question Presented:

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The continuing violation doctrine provides that when a series of acts are performed by an employer, "so long as one act falls within the charge filing period, discriminatory and retaliatory acts that are plausibly or sufficiently related to that act may also be considered for the purposes of liability." *Morgan*, 536 U.S. at 114. Thus, in *Ledbetter*, it was "undisputed that Ledbetter's claim is not entirely time barred." *Ledbetter*, 421 F.3d at 1180.

Here, by contrast, it is equally undisputed that Haynes' claim is entirely time barred. Every act for which evidence of discrimination existed occurred more than 300 days before Haynes filed her EEOC charge. Thus, the continuing violation doctrine is not at issue. Indeed, what Haynes is seeking is not reinstatement of the continuing violation doctrine. She is seeking a significant expansion of that doctrine.

Second, this case does not involve a pay disparity issue. And in *Ledbetter*, the Petitioner argued that pay disparity issues should be treated differently from other recurring causes of action. (*See* Tr. of Oral Argument, *Ledbetter v. Goodyear Tire & Rubber Co.*, No. 05-1074, 2006 WL 3422212, at *4 (Nov. 27, 2006) ("JUSTICE KENNEDY: But are you saying that the rule for paycheck decisions is different than the rule for other

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(Cont'd)

> Whether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period.

Ledbetter v. Goodyear Tire & Rubber Co., No. 05-1074, 2006 WL 448515, at *i (Feb. 17, 2006).

sorts of decisions? MR. RUSSELL: It – it is."). In fact, this case does not even involve recurring identical acts. Rather, the acts here, although similar, are not identical. Thus, this is not a recurring discrimination case, but merely a case alleging multiple acts of discrimination. Haynes' attempted reliance on *Ledbetter*, therefore, is misplaced.

CONCLUSION

As shown above, Haynes has not identified any compelling reasons for granting the Petition. Accordingly, Level 3 requests that the Petition be denied.

Respectfully submitted,

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